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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

UNITED STATES OF AMERICA

v.

KENNETH W. MEDENBACH,

Defendant.

Case No. 1:15-CR-00407-MC

UNITED STATES' SENTENCING MEMORANDUM

Defendant was convicted by jury of Unlawful Camping and Unlawful Occupancy in violation of 43 C.F.R. § 8365.1-6, Oregon Supplemental Rules, FR Vol. 70 No. 159, 48586 (2005), 43 C.F.R. § 8360.0-7, and 43 U.S.C. § 1733(a). The maximum penalty is one year imprisonment and a $1,000 fine. FR Vol. 70 No. 159, 48587 (2005), 43 C.F.R. § 8360.0-7, 43 U.S.C. § 1733(a).

RELEVANT FACTS

In May 2015, defendant sent two letters to the Bureau of Land Management (BLM) Medford Office claiming "adverse possession" of certain public lands managed by BLM. Defendant claimed that the federal government's possession of public land violated the Federal Enclave Clause (Article I, § 8, Clause 17), that federal courts lacked the power of judicial review because the Constitution granted courts only the power to "support," not "interpret," the Constitution, and that *Marbury v. Madison* was wrongly decided and violated the Tenth Amendment. Defendant erected a cabin on the BLM land at Peavine Road near Galice, Oregon, and refused to remove it.

In June 2015, BLM Special Agent Jason Curry went to the site and observed defendant's cabin and pickup truck; defendant was not present. SA Curry met defendant and asked defendant about his intentions. Defendant said he was just waiting to get cited. Agent Curry advised defendant of BLM's 14-day camping limit and the law against occupying BLM lands, and warned that defendant would have to vacate the land 14 days from July 1st. Defendant told Agent Curry to cite him now as defendant had been residing at the cabin since May 17th, but Agent Curry declined.

Defendant refused to remove his cabin. In November 2015, Agent Curry again asked defendant to remove his cabin from public lands. Defendant refused, saying he wanted to go to court. Defendant was then charged with Unlawful Camping and Unlawful Occupancy of Public Lands. He was arraigned on November 15, 2015, and released after agreeing that he "not change place of residence without the prior approval of U.S. Pretrial Services" and that he "shall not reside, camp on, occupy, or leave any property on federal lands without prior approval of the Court."

On January 15, 2016, defendant was arrested in Burns, Oregon, driving a government vehicle stolen from the Malheur Wildlife Refuge. A news video also showed defendant as one of the occupiers residing on the Malheur Wildlife Refuge.[1] The court issued an arrest warrant and revoked defendant's pre-trial release. Defendant was convicted by jury on April 18, 2016. The court authorized the government to remove defendant's cabin. The government allowed defendant an opportunity to arrange the cabin removal and cleanup on his own, but defendant was unable to do so. On May 23, 2016, BLM removed defendant's cabin from public lands, costing $2,506.45 (Attachment A).

Defendant remained in custody until July 15, 2016; the parties agreed to defendant's release after the draft pre-sentence report recommended 6 months imprisonment in this case.[2]

GOVERNMENT'S RECOMMENDATION

The government concurs with the PSR that the following advisory guidelines analysis applies:

Base Offense Level, § 2B2.3	4
Adjustments	0
Total Offense Level	**4**
Criminal History Category	**I**
Guidelines Range	**0-6 months imprisonment**

[1] As a result of his participation in the Malheur Wildlife Refuge takeover, defendant is charged with Conspiracy to Impede Officers of the United States and Theft of Government Property in case number 3:16-CR-00051-BR-16.

[2] Defendant was also released to home detention in Case number 3:16-CR-00051-BR-16. He is pending trial in that case.

As documented in the PSR and government's exhibits presented at trial, defendant has a long history of failed challenges to the government's ownership of public lands.

In *United States v. Medenbach*, 95-CV-00581 (D. Oregon 1995), the United States obtained an Injunction prohibiting defendant from occupying BLM land. Defendant sent BLM a letter claiming "adverse possession" of BLM land, erected a small cabin, cut trees, and posted "No Trespassing" signs. Defendant claimed that the federal government had no constitutional authority over public lands. The district court rejected defendant's claim and held that defendant could not claim adverse possession against the government. Defendant was found in Contempt after he entered BLM lands, cut trees, and reconstructed his cabin in defiance of the court order (Government's Trial Exhibit 16, pages 34-40).

In *United States v. Medenbach*, 116 F.3d 487 (9th Cir. 1997), defendant was again convicted of Unlawful Occupation of Public Lands after he claimed adverse possession of public lands, erected a large tent with metal flue and woodstove, and indicated he would remain until forcibly removed (PSR ¶ 34). The 9th Circuit Court of Appeals rejected the same legal challenges defendant made in this case. The Ninth Circuit also upheld the magistrate judge's pretrial detention order specifying that "Defendant poses a risk to the safety of other persons or the community because [he] acknowledges intimidation practices, references 'Ruby Ridge' and 'Waco, Texas,' and clearly would not follow conditions of release restraining his presence at the scene of the alleged unlawful activity." 116 F.3d 487, Section 2.

The present case is the *third time* defendant has unlawfully claimed public lands by adverse possession and erected a structure on it.[3] He also has pending charges for unlawfully occupying the Malheur Wildlife Refuge and theft of government property, all committed while on pre-trial release in the present case. He has been apprised of the law from the federal district courts, the Ninth Circuit, and the Supreme Court, to no avail. It is apparent from his activities in his present cases that he is in good health, able bodied, industrious, and is able to operate a successful chainsaw carving business when he wants to. In considering the factors under 18 U.S.C. § 3553(a), this is one of the few cases where maximum sanctions are appropriate.

As such, the government recommends the following sentence:

1. Defendant be placed on a **5-year term of supervised probation** to the U.S. Probation Department with the standard conditions and including the following special conditions:

a) Defendant shall serve 6-months incarceration with credit for time served.

b) Defendant shall not enter or remain on federal public lands, except when necessary to travel on public highways through federal public lands.

c) The defendant shall not reside, camp, occupy, or leave any property on, or remove any natural resources from, federal lands, or cause others to do so, without prior written approval of his probation officer.

2. Defendant shall pay a **$1000 fine** and a **$25 fee assessment**.

[3] Defendant's adverse possession claim included ***private property*** as well, which defendant then quitclaimed to the State of Oregon. See Government's Trial Exhibit 10.3, Defendant's Exhibit 32 (Quitclaim Deed).

3. Defendant shall pay **$2,506.45 restitution** to BLM for the cabin removal and cleanup costs, payable to: Bureau of Land Management, Medford District, 3040 Biddle Road, Medford, OR 97504, Attention: Don Robinson, Case #LM15017830.

Dated this 21st day of July 2016.

Respectfully submitted,

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Assistant United States Attorney